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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]

NICK JANKOVICH and PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY,
Petitioners,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Nick Jankovich and Paul Jankovich, co-partners, doing business as Calumet Aviation Company, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-entitled case on October 24, 1963.

OPINION BELOW

The opinion of the Supreme Court of Indiana, Judge Jackson dissenting, is reported at 193 N.E. 2d 237 (*infra*, p. 1a). No opinion was written by the Porter Circuit Court, Lake County, Indiana.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on October 24, 1963 (*infra*, p. 10a).[1] Its order denying rehearing was entered on December 17, 1963. An order was entered on February 28, 1964 by Mr. Justice Tom C. Clark extending the time for filing a petition for a writ of certiorari to April 15, 1964. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). See, *infra*, pp. 27-30.

QUESTION PRESENTED

Whether a municipal ordinance which zones property adjacent to a public airport for the purpose of maintaining safe and unobstructed approaches to the airport constitutes a valid exercise of the police power or is a taking of property without compensation in violation of the Fourteenth Amendment of the United States Constitution.

STATUTES INVOLVED

Ordinance No. 2897 of Gary, Indiana, approved September 20, 1949, is entitled: "An ordinance regulating and restricting the height of structures, and otherwise regulating the use of property in the vicinity of the Gary Municipal Airport by creating airport approach and turning zones and establishing the boundaries thereof; defining certain terms used therein; providing for appeals therefrom; and imposing penalties for violation thereof." The ordinance is summar-

[1] The practice of the Indiana Supreme Court is not to render a judgment separate from the opinion. The directions contained at the conclusion of the opinion constitute the judgment. The directions are executed by the lower court upon certification to it of the opinion.

ized in pertinent part in the Statement, *infra*, pp. 4-6, and is set out in full in Appendix B, *infra*, pp. 11a-17a. The Federal Airport Act, as amended (60 Stat. 170, 78 Stat. 158, 49 U.S.C. § 1101) is set out in pertinent part in Appendix C, *infra*, pp. 18a-23a. The Indiana Tall Structures Act (5 Burns Ind. Stat. 140-327 *et seq.*, 1963 Cum. Supp.) is set out in full in Appendix D, *infra*, pp. 24a-30a. The provision of the Indiana enabling statute pertaining to the adoption of airport zoning by a municipality (5 Burns Ind. Stat. 14-442) is set out in full in Appendix E, *infra*, pp. 30a-32a.

STATEMENT

In October 1939, the City of Gary, Indiana, enacted an ordinance declaring that it needs and shall acquire, improve, operate, and maintain an airport (Pl. ex. 1, R. 398). On May 29, 1947, the United States granted land to Gary "for and in consideration of the development and operation of the . . . demised premises as a public airport in perpetuity . . . and for the benefit which shall accrue to the United States . . . from the continued use of such property as an airport . . ." (Pl. ex. 2, p. 1, R. 399). Automatic reversion of the title to the United States was provided "if and in the event that the Administrator of Civil Aeronautics or his successor in function determines that the premises have not been developed for airport purposes within a reasonable period of time . . ., or that after having been so developed the premises have ceased to be used or are necessary for airport purposes" (Pl. ex. 2, p. 2, R. 399). Gary promised that "such airport will be operated as a public airport on fair and reasonable terms and without unjust discrimination" (*ibid.*).

The demised land encompassed an area of approximately one square mile bounded on the south side by the Grand Calumet River (*infra*, p. 2a). The master plan of the airport called for the construction of three runways on this land, an east-west runway, a northwest-southeast runway, and a north-south runway (Pl. ex. 10, R. 634). The east-west runway has not been constructed (R. 619-620). The northwest-southeast runway, planned for a length of 6,000 feet and a width of 150 feet. has been constructed to a length of 4600 feet and a width of 100 feet (R. 620). The north-south runway, immediately involved in this proceeding, is planned for length of 3900 feet and a width of 150 feet (*ibid.*). It has been constructed to a length of 3600 feet and a width of 100 feet; its original length just prior to 1950 was 3100 feet, which was extended in 1954 or 1955 by 300 feet on the north end and 200 feet on the south end, leaving 300 unconstructed feet at the south end (R. 512, 541-542, 620, 662, 691, 695-696, 703). Federal and municipal funds were expended for this airport construction (R. 526, 622, Def. ex. P, p. 2, R. 1112).[2]

In September 1949, before the inception of airport construction, the City of Gary enacted an airport zoning ordinance to regulate and restrict the height of structures and the use of property in the vicinity of the airport (Pl. ex. 3; R. 634, *infra*, pp. 11a-17a).

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[2] The Grant Agreement of June 1949 between the City of Gary and the Civil Aeronautics Administration shows that the United States obligated itself in the sum of $166,000 as its contribution to the construction of the airport (*infra*, p. 34a). Not in evidence, the Grant Agreement has been obtained from the Federal Aviation Agency, and relevant parts of it are excerpted in Appendix F, *infra*, pp. 33a-41a. Further Grant Agreements were entered into on May 22, 1950, June 28, 1951, and August 12, 1957.

As presently pertinent the operative part of the ordinance provides that (Pl. ex. 3, p. 3, *infra*, pp. 13a-14a):

> Section 4: HEIGHT LIMITS—Except as otherwise provided in this ordinance, no structure shall be erected, altered or maintained, in any airport approach zone or airport turning zone to a height in excess of the height limit herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:
>
> (a) Turning Zone, 150 feet
>
> (b) Outer Area Approach Zone, 150 feet
>
> (c) *Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope.* [Emphasis supplied.]
>
> (d) Transition Zone, height limit based on 7 to 1 slope from edge of inner area approach zone to maximum height of 150 feet
>
> All height limits shall begin at elevation of 590 feet above sea level.

The "40 to 1 slope" required by Section 4(c) of the ordinance pertains to "glide angle" or "glide slope". Glide angle or slope is determined as the ratio of horizontal distance to vertical elevation. A 40 to 1 glide angle or slope means 40 feet of forward horizontal distance for one foot of vertical elevation. (R. 681-682).

Made part of the ordinance was a detailed zoning map and layout plan (Pl. ex. 3, pp. 2-3, *infra*, p. 13a). Exempt from the ordinance was any existing structure and any structure whose construction or alteration had been begun and could with diligence be completed in

two years (*Id.*, p. 3, *infra*, p. 14a). Provision for variance was made if compliance with the ordinance "would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this Ordinance" (*Id.*, pp. 3-4, *infra*, p. 14a). A detailed hearing procedure was prescribed (*Id.*, pp. 4-5, *infra*, pp. 14a-16a).

The preamble to the ordinance stated that "airport hazards endangered the lives and property of users of the Gary Municipal Airport and the occupants of land in its vicinity, and in effect reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investments therein . . ." (Pl. ex. 3, p. 1, *infra*, p. 11a). To overcome these hazards, the preamble stated, the Board of Aviation Commissioners of the City of Gary has "adopted certain standards for the safe descent, landing and ascent of aircraft and for the proper and safe use of the Gary Municipal Airport and landing field in respect to height and location of structures and the use of land . . ." (*ibid.*). Accordingly, the preamble concluded, enactment of the ordinance "is necessary in the interest of the public health, public safety, and general welfare," to the end that "creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power . . ." (*ibid.*).

On March 20, 1950, subsequent to enactment of the ordinance, petitioners entered into a 20 year lease, with an option for an additional 10 year period, to operate the airport (Pl. ex. 4, R. 570). Pursuant to that lease, petitioners expended about $400,000 to build hangars

and purchase equipment and facilities for the operation of the general business of the airport (*infra*, pp. 2a-3a).

This was the situation which prevailed when respondent Indiana Toll Road Commission came on the scene. It constructed a toll road in an east-west direction parallel with the south side of the Gary Municipal Airport approximately at right angles to the north-south runway (*infra*, p. 3a, Def. ex. A, R. 917). The Commission acquired the right-of-way in 1954 and 1955 (R. 589, 661). It completed construction and opened the road for traffic in 1956 (*ibid.*). The road was constructed along the south boundary of the airport (R. 476). The road was raised about 30 feet above the surface of the land on which it was built (Pl. ex. 15, def. ex. A). It was constructed partly on the river bed of the Grand Calumet River; the toll road shifted the river bed north a distance varying from 100 to 175 feet; it brought the north line of the river bed 175 feet closer to the south line of the airport property, approximately the width of the river (R. 594-596, pl. exs. 15, 16). The north edge of the road is 1,043 feet south of the existing south end of the north-south runway (or 743 feet from the south end of the proposed but not yet constructed length of the runway), and is elevated 24.6 feet higher than the south end of the north-south runway (Def. ex. A, R. 917, *infra*, p. 3a). Under the ordinance the permitted elevation of structures at the location of the road was about 18½ feet, with the result that the road penetrated about 6½ feet into the air space protected by the ordinance (*infra*, p. 3a). The consequence of this encroachment was to reduce the glide slope from about 38 to 1 to about 27 to 1, causing the north-south runway to be unusable for aircraft grossing 15,000 pounds or more (R. 671-701, 546-550, 556-557, 645-651, 655).

To secure relief from the harm caused by the impaired use of the north-south runway, petitioners sued in the Porter Circuit Court, Lake County, Indiana, for injunctive relief and damages (R. 5-16). In defense, at the *nisi prius* level, respondent first took the position that the zoning ordinance "was, as a matter of law, an act done in the exercise of said City's police power"; that it "constituted a restriction of the use of property, and did not, as a matter of law, constitute an appropriation of property within the meaning of either the Constitution of the State of Indiana or the Constitution of the United States"; but that respondent's own action as a "body politic" constituted a supervening exercise of "its politic power" (R. 46-47). Upon rejection of this argument by the Circuit Court (R. 49), respondent switched its position to an attack upon the validity of the zoning ordinance, claiming that it caused an "unconstitutional taking of property without payment of due compensation and is offensive to and violative of the 5th and 14th Amendments of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Indiana" (R. 622). Rejecting this argument, the Circuit Court ruled that (R. 634):

> With reference to the third objection that the zoning ordinance is attempting to do under police powers what the courts say should be done under the right of eminent domain, I don't feel this statute imposes an obligation upon the airport authority to condemn that which immediately rests . . . without the physical boundaries of the airport as established under the statute of 1945.

After trial, while denying injunctive relief, the Circuit Court awarded petitioners a judgment "in the sum of $164,000.00 and costs" (R. 244).

On appeal to the Indiana Supreme Court, that court held that the zoning ordinance was "wholly void . . ." (*infra*, p. 10a). Citing this Court's decisions in *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84, it held that "the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation" (*infra*, pp. 5a-7a). Citing this Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, it held that "the taking or appropriating of private property by the government for a specific public use . . . can be effected only if compensation is provided" (*infra*, p. 7a). Citing this Court's decision in *Village of Euclid* v. *Ambler*, 272 U.S. 365, it held that respondent was under no initial obligation to seek a variance, for no "exhaustion of administrative remedies" is required "when a zoning ordinance is invalid as an entirety" (*infra*, p. 8a). And, citing this Court's opinion in *Mugler* v. *Kansas*, 123 U.S. 623, it held that it was free to look through the declaration of policy in the ordinance and treat it as an artifice (*infra*, pp. 8a-9a). It therefore invalidated the ordinance on the sole and exclusive ground that it "was unconstitutional in that it purported to appropriate, without compensation, the reasonable and ordinary use of the property on which appellant [respondent here] constructed its toll road" (*infra*, p. 4a).

REASONS FOR GRANTING THE WRIT

Based on the premise that the usable air space above land is property which cannot be taken without compensation, the court below nullifies the airport zoning ordinance on its face, unrelated to any claim or finding of specific arbitrary application, concluding that it is a "wholly void" enactment "invalid as an entirety"

(*infra*, pp. 10a, 8a). The central question therefore is whether the police power is exercisable to zone property within the vicinity of a public airport for the purpose of maintaining safe and unobstructed access to the airport, or whether the governmental means to serve this end are restricted to purchase or condemnation. On the constitutional level the question calls for reconciliation in a contemporary setting of the ancient tension between the police power and eminent domain. *Mugler* v. *Kansas*, 123 U.S. 623, 668, 669. On the practical level the import of the question is immense. "The protection of airport approaches from dangerous obstruction offers one of the most pressing of current legal problems" Rhyne, Airports and the Courts, 164 (1944). "In the field of airport law the most important questions confronting the lawyer today—and probably the most difficult—are those arising out of the conflict which almost inevitably exists between the interests of the owner or occupant of land in the immediate vicinity of an airport and those of the airport owner. . . . Can the airport owner, by court action or the adoption of airport zoning regulations, prevent the landowner from erecting a structure which would be an obstruction to the landing and taking-off of aircraft at the airport, or from using his property in a manner hazardous to such aircraft operations?" Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539 (1946).

I

The dimensions of the constitutional question can be quickly sketched. It is of course datum that "'an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip itself, is

constructed. . . .' Without the 'approach areas,' an airport is indeed not operable." *Griggs* v. *Alleghany County*, 369 U.S. 84, 90. Zoning the property adjacent to the airport to maintain unobstructed approaches fulfills the need of preserving access but at the same time diminishes the use to which the adjacent property can be put. Lessened use is of course inherent in regulation and does not by itself constitute a taking. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413. The point at which diminution reaches a magnitude constituting a taking is a question of degree. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168. "There is no set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594.

But to say that the question is one of degree does not mean that it is wholly at large. Zoning is indispensable in our crowded society as a means of adjusting conflicting property and community demands. Space, height, and use limitations are commonplace and their validity unquestionable (*Gorieb* v. *Fox*, 274 U.S. 603, 608):

> It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have

> arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. . . . State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Airport zoning is in principle no different. The problem of approach protection to which airport zoning is directed has been summarized as follows (Rhyne, Municipal Law, 489 (1957)):

> To protect the public interest in public airports by preventing construction or growth of hazards or obstructions in the approach zones of properly located and constructed airports, municipal, state and federal governments have turned to police power zoning to limit the height of structures and objects of natural growth in airport approach zones. A municipality may spend large sums from public funds for the very essential public purpose of constructing and maintaining an adequate and safe airport to serve its residents, only to have this airport rendered worthless almost overnight by the erection or growth of some obstruction in the airport's approach zones which prevents full use of the landing facilities there made available at public expense.

The House Committee on Interstate and Foreign Commerce has warned that: "Hundreds of millions of dollars are being spent on airports. But unless an airport can be approached without encountering obstructions

the investment therein becomes valueless—or the airport itself becomes a death trap. To protect passengers and flight crews, and to assure that airports can be used in connection with defense of the Nation in time of emergency, it is vital that there be adequate zoning. Unless zoning is accomplished now, before airport approaches are further obstructed, the task will some day reach staggering proportions. Few steps are of such urgency. Few steps are so essential to promote safety." H. Rep. No. 784, 78th Cong., 1st sess., 11.[3]

Responsive to these considerations, the Florida Supreme Court, in emphatic conflict with the court below, has endorsed airport zoning as a valid exercise of the police power. *Harrell's Candy Kitchen, Inc.* v. *Sarasoto-Manatee Airport Authority,* 111 So. 2d 439 (Fla. 1959). "We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations promote the general welfare of the state and community served, contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use facilities in taking off and landing as well as those living in the vicinity thereof. Well settled principles with respect to zoning apply equally to airport zoning." *Id.* at 443.[4] Informed commenta-

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[3] See also, Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 542 (1946); 2 Yokley, Zoning Law and Practice, 43-45, 61-75 (1953).

[4] Cases pro and con, whether by holding, dictum, or implication, are in general not illuminating, and are collected in Rhyne, Municipal Law, 490 (1957), and Anno., 77 A.L.R. 2d 1355, 1362-64.

tors have likewise uniformly held the view that reasonable airport zoning is valid.[5]

Accordingly, unless airport zoning is to be *a priori* nullified as beyond any legitimate exercise of police power, the question reduces to whether the ordinance in this case is on its face so wanting in "reasonableness" (*Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-595) that it is "wholly void" (*infra*, p. 10a). There is no claim or showing that the height limitations the ordinance prescribes are not strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight. The ordinance exempts from its operation existing structures and those which can with diligence be completed within two years of enactment. Current use of property is therefore wholly undisturbed. Nor is future use of property restricted by the ordinance if good cause for variance is shown. A full hearing procedure is established. In this case respondent acquired the adjacent property years after the ordinance was enacted and therefore with full notice of the limitations on its use. And it made no effort to seek a variance, thus foregoing the opportunity to show superior equity in its proposed use of the adjacent property.

Invalidation of the ordinance thus rests on the bare claim that ownership of the property of itself precludes zoning to regulate its use. It is that claim which the court below sustains. According to it, "'Had the . . . [adjacent property owner] chosen to

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[5] Rhyne, Municipal Law, 491 (1957); Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner*, 11 Law & Contemp. Prob. 539, 554 (1946); Rhyne, Airports and the Courts, 164-190 (1944); Note, *Zoning—The Airport And The Land Surrounding It In The Jet Age*, 48 Ky. L.J. 273 (1960); Manion, Law of the Air, 77 (1950).

erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at . . . [the] airport' " (*infra*, p. 5a). But that doctrine can hardly survive its statement. "Ownership does not always mean absolute dominion." *Marsh* v. *Alabama*, 326 U.S. 501, 506. The essence of civilized society is adjustment of competing demands in use of land and other valuables. The absolutism of the court below is atavistic, *Ferguson* v. *Skrupa*, 372 U.S. 726, and requires this Court's intercession to maintain governmental viability in the important area of airport zoning. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 303.

II

The question has national importance. The ordinance in this case is typical of many throughout the country. Adoption of airport zoning ordinances has been impelled by federal authority in furtherance of national aviation policy. Only last month, on March 11, 1964, Congress amended the Federal Airport Act explicity to confirm "adoption of zoning laws" as a central element of federal aviation policy (*infra*, pp. 18-19).

The origin of airport zoning, its widespread incidence, and the union of municipal, state, and federal authority to further it has been described as follows (Rhyne, Municipal Law, 489, 490-491 (1957)):

> The first suggestion that zoning should be the answer to the problem of airport approach protection came in 1928 when Alameda County, California adopted an ordinance prohibiting the erection or maintaining of any "structure or obstruction to the operation of aircraft, at a height in

excess of fifty (50) feet upon unincorporated territory . . . within one thousand (1,000) feet of any boundary of a public air navigation facility . . . within the County of Alameda." In 1929, the Board of Port Commissioners of the City of Oakland, California, adopted a similar ordinance. The federal government through the Civil Aeronautics Authority, as early as 1930 and again in 1938 recognized that airport zoning was the "simplest solution . . . and therefore the most satisfactory way that can be adopted . . . to prevent obstructions in the approaches of airports." The Civil Aeronautics Administration has an established policy of inserting in all grant agreements with cities for expenditure of federal funds on public airports the requirement that the city will prevent obstructions, if possible and within its powers, by zoning, acquisition of property interests, or otherwise.

* * *

A recent review of state airport legislation reveals that airport zoning acts of one type or another have been adopted in all but eight states. These acts are usually denominated Airport Zoning Acts or Municipal Airport Approach Protection Acts and provide for the promulgation and administration of airport approach zoning regulations by subordinate units of government. Many cities have adopted airport zoning ordinances pursuant to the statutes, and the ordinances are apparently working well. Most of the enabling acts have been written or amended so as to be substantially similar to the 1944 model act formulated by NIMLO [National Institute of Municipal Law Officers] and the Civil Aeronautics Administration.[6]

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[6] For a tracing and summary of some prominent ordinances, see Rhyne, Airports and the Courts, 173-176 (1944). See also, Note, *Zoning—The Airport And The Land Surrounding It in The Jet Age*, 48 Ky. L.J. 273, 279 (1960).

Illustrating the contemporary significance of airport zoning, public hearings were resumed on February 13, 1964, by the Illinois Department of Aeronautics "concerning the establishment of Airport Zoning Regulations for Chicago-O'Hare International Airport, Chicago, Illinois,"[7] the nation's busiest airport.[8]

The federal interest in airport approach protection expressed in the Federal Airport Act is at the heart of airport zoning. "Aircraft when taking off or landing . . . need space at the ends of the landing strips, known as 'approach areas,' over which they may safely gain or lose altitude."[9] The airport approach standards incorporated in zoning ordinances to fulfill this need are based directly on federal criteria promulgated by the Federal Aviation Agency. The FAA's authority in the field of airport approach protection derives primarily from the Federal Airport Act and the role ascribed by Congress to the FAA Administrator to propose and annually revise "a national plan for the development of public airports in the United States . . ." (§ 3). "In order to bring about, in conformity with the national airport plan . . . . the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics . . ." (§ 4). Congress adopted a grant-in-aid program under which adherence to federal standards is made the condition of the grant of funds. The Act defines as an "Airport hazard" "any structure or object of natural growth located on or in the vicinity

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[7] Notice, State of Illinois, Department of Aeronautics, February 3, 1964.

[8] FAA Air Traffic Activity, Calendar 1962, 35.

[9] FAA, Small Airports, 9 (1959).

of a public airport, or any use of land near such airport, which obstructs the air space required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft" (§ 2(4)). A "sponsor" in submitting a "project application" for a grant of funds for airport development is required to formulate his proposal "in accordance with standards established by the Administrator, including standards for site location, airport lay-out, grading, drainage, seeding, paving, lighting, *and safety of approaches*" (§ 9, emphasis supplied). More particularly, as a "condition precedent" to approval of the project, "the Administrator shall receive assurances in writing, satisfactory to him," that *inter alia* (§ 11(3)):

> the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards *and by preventing the establishment or creation of future airport hazards.* [Emphasis supplied.]

And, crucially significant, Congress only last month, on March 11, 1964, made explicit the especial appropriateness of zoning as one means to prevent establishment or creation of airport hazards. Thus, Congress added a new paragraph (4) to section 11 of the Act requiring that the Administrator obtain from the sponsor written assurance that:[10]

> appropriate action, *including the adoption of zoning laws*, has been or will be taken, to the extent

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[10] Public Law 88-280, § 10, March 11, 1964; H. Conf. Rep. No. 1154, 88th Cong., 2d Sess., in 110 Daily Cong. Rec. 3519 (Feb. 26, 1964); S. Rep. No. 446, 88th Cong., 1st Sess., 2, 3, 20-25; H. Rep. No. 1002, 88th Cong., 1st Sess., 2, 6, 15.

> reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations *including landing and take-off of aircraft.* [Emphasis supplied.]

Specific advertence by Congress to "adoption of zoning laws" to assure land use compatible with airport operation confirms the actual long-standing practice. The airport approach standards, measuring the air space in the vicinity of the airport which should be free of obstructions to maintain safe take-off and landing, are prescribed by the FAA in Technical Standard Order No. N18 (TSO-N18), dated April 26, 1950, as amended, entitled "Criteria For Determining Obstructions To Air Navigation." To secure adherence to these prescribed approach standards the "adoption and enforcement of zoning regulations" is one of the means specifically enumerated in the FAA's standard form project application to which the sponsor must subscribe (Form FAA-1624, Part III 7, Sponsor Assurances):

> Insofar as it is within its power and reasonably possible, the Sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace *or by the adoption and enforcement of zoning regulations*, prevent the construction, erection, alteration, or growth of any structure, tree or other object in the approach areas of the runways of the Airport, which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Section A of FAA Technical Standard Order No. N18, dated April 26, 1950, as amended. [Emphasis supplied.]

Furthermore, the FAA authors a Model Airport Zoning Ordinance. In the foreword to the model ordi-

nance, the FAA notes that attached to it is "a copy of Technical Standard Order-N18, which sets forth criteria for determining obstructions to air navigation." It further observes that, in establishing and defining by ordinance the "various zones required for the protection of the airport from the encroachment of obstructions or hazards to aircraft", the "size of these zones at each airport should be based on the standards established for the type of the airport by TSO-N18." And it advises that its personnel is available to guide in the application of the standards:

> The Airports Branches of the several Regional Offices of the Federal Aviation Agency and the District Airport Engineers are available to assist in developing airport zoning regulations through advice as to the application of the criteria of TSO-N18 to the particular airport and the desired approach protection.

Even with respect to the "runway clear zone," described as "the innermost part of the runway approach area" (14 CFR § 151.9(b)), zoning in lieu of a property interest may be relied upon in the case of "existing airports where improvements are made to runways or landing strips" (*id.* § 151.11(d)) or "where substantial improvements are made that do not benefit a specific runway or landing strip" (*id.* § 151.11(e)), the applicable FAA regulation stating that (*id.* § 151.11(f)):

> If a sponsor or other public agency shows that it is legally able to prevent the future erection or creation of obstructions in the runway clear zone area, and adopts protective measures to prohibit their future erection or creation, that showing is acceptable for the purposes of paragraphs (d) and (e) of this section in place of an adequate property interest. . . . In each case, the sponsor must

> furnish information as to the specific height limitations established and as to the current and foreseeable future use of the property to which they apply. The information must include an acceptable legal opinion of the validity of the measures adopted, including a conclusion that the height limitations are not unreasonable in view of current and foreseeable future use of the property, and are a reasonable exercise of the police power, together with the reasons or basis supporting the opinion.

Congressional confirmation and FAA practice are rooted in studies advocating airport zoning to protect aerial approaches. In the pioneer study in 1930, the United States Department of Commerce, Aeronautics Branch, recommended that "municipalities and other political subdivisions . . . exercise the police power in the promulgation of properly coordinated zoning ordinances applying equitably to public airports and intermediate landing fields and to commercial airports of the public utility class, as well as other land uses."[11] The so-called "Doolittle Report" to the President in 1952 made "two suggestions" pertaining to aerial approaches: "(1) that certain extensions or over-run areas be incorporated in the airport itself, and (2) that larger areas beyond such extensions be zoned by proper authority, not only to prevent the erection of obstructions that might be harmful to aircraft, but also to control the erection of public and residential buildings as a protection from nuisance and hazard to people on the ground."[12]

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[11] Report of the Committee on Airport Zoning and Eminent Domain, December 18, 1930, p. 9.

[12] Report of the President's Airport Commission, The Airport and Its Neighbors, 7 (May 16, 1952).

Finally, airport zoning serves the twofold purpose of maximizing safety and protecting investment. "The maintenance of an adequate airport system is the single most important factor in insuring air safety. The importance of adequate airport facilities was cogently demonstrated in testimony presented by the Federal Aviation Agency. The agency, in urging continuation of the program, observed that more than two-thirds of all aircraft accidents occur either at or within 5 miles of the airport." S. Rep. No. 446, 88th Cong., 1st Sess., 19.[13] As to investment, "Since the federal aid to airport program was first initiated in fiscal year 1947, total expenditures have amounted to $550,609,855." *Id.* at 7. Estimated cost of further development over the next five years is $1,082,439,000 of public funds,[14] with the federal grant-in-aid program providing for $225,000,000 over the next three years.[15] The factors of safety and investment underscore the communal importance of airports and the contribution to the general welfare which airport zoning makes. "Airports are not just local assets. They do not just benefit the larger airlines, the private and business pilots and the air travelers, but vitally affect the prosperity, well-being and security of all our citizens." *Id.* at 17.

The situation of the Gary Municipal Airport in this case fits the federal pattern precisely. It is one of the airports which make up the National Airport Plan;

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[13] See also, Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st sess., 29, 184; Statistical Review and Resume of Accidents, US Air Carriers, Calendar Year 1960, CAB 1963, 12.

[14] National Airport Plan, Requirements for Fiscal Years 1963-1967, 1963 Supplement, FAA, Ex. 1, p. 75 (March 1963).

[15] Public Law 88-280, § 4, March 11, 1964.

it serves the communities of Gary, Hammond, and East Chicago; and improvements in it to meet civil aviation needs for fiscal years 1963-1967 are considered necessary by the National Airport Plan.[16] The grant agreement between the City of Gary and the Civil Aeronautics Administration obligates Gary as the sponsor to prevent insofar as it can land use in or out of the airport boundaries which would create air hazards, and stipulates "the adoption and enforcement of a zoning ordinance and regulations" as one of the means to that end (*infra*, pp. 41a-42a):

> Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either *by the adoption and enforcement of a zoning ordinance and regulations* or by the acquisition of easements or other interests in lands or airspace, or by both such methods. . . . The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946 unless otherwise authorized by the Administrator. [Emphasis supplied.][17]

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[16] National Airport Plan, Requirements for Fiscal Years 1963-1967, FAA, 101 (April 1962).

[17] Office of Airports Drawing No. 672 was superseded by Office of Airports Drawing No. 814, the latter being incorporated in the presently effective Technical Standard Order N18 as the schematic representation of the obstruction criteria. The Grant Agreement

The zoning ordinance which Gary adopted in September 1950 was tailored from the then current model ordinance which the Civil Aeronautics Commission had authored in February 1947. And the federal interest is particularly apparent in that the land on which the airport is constructed was donated by the United States "for the benefit which shall accrue to the United States . . . from the continued use of such property as an airport", with automatic reversion of the title to the United States if the FAA Administrator determines that "the premises have ceased to be used or are necessary for airport purposes" (*supra*, p. 3).

The court below thus clearly misapprehends the federal scheme when it states that the "federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation" (*infra*, p. 9a). The federal scheme is indeed based on the contrary view and the decision below is wholly incompatible with it in totally nullifying airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. Equally wrong is reliance by the court below upon this Court's decisions in *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84, for the conclusion that airport zoning, without more, constitutes a taking (*infra*, pp. 5a-7a). *Causby* and *Griggs* hold that low flights at frequent

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between the City of Gary and the Civil Aeronautics Administration of June 19, 1951, states in paragraph 8(b) that "The Airport Approach Standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 814 dated April 26, 1950 unless (otherwise) authorized by the Administrator".

intervals which significantly diminish the use of property lying below the aircrafts' path result in a taking which requires compensation. The decisions do not reach the question whether the police power is exercisable to zone property adjacent to the airport to prevent future development of land use incompatible with safe and efficient airport operation. It is this question of first impression which requires this Court's review.

III

Independently of its national significance, the question is important even limiting the impact of the decision below to Indiana, for it nullifies a state-wide policy of airport zoning. There are 63 airports in Indiana included within the National Airport Plan.[15] In 1957 Indiana enacted a statute known colloquially as the Tall Structure Act and formally entitled "An act to promote safety, welfare and protection of persons and property in the air and on the ground by regulating the height, location and visual identification characteristics of certain structures." 5 Burns Ind. Stat. 14-327 *et seq.* The Act is designed to apply only where no existing airport zoning already obtains, for it is "not [to] apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law. . . ." *Id.* 14-339. The policy underlying this void-filling statute is expressed as follows: "The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic

[15] National Airport Plan, Requirements for Fiscal Years 1963-1967, FAA, 99-102 (April 1962); *Id.*, 1963 Supplement, 38-39 (March 1963).

communication within this state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern of any public use airport in this state be maintained in a reasonably unobstructed condition for the safe flight of aircraft. To that end, the location and height of structures and the use of land related thereto, is regulated." *Id.* 14-327. The scheme of regulation is to prohibit the erection of structures which exceed specified height limitations unless a permit is obtained (*id.* 14-329); to prohibit the issuance of a permit if certain defined height limitations are exceeded (*id.* 14-330); and, within permissible height limitations, to base the issuance of a permit upon a determination by the Indiana Aeronautics Commission of "a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors." (*id.* 14-333).

The scheme of regulation encased in the Indiana Tall Structure Act is in principle no different from the Gary ordinance. The decision below nullifies the Gary ordinance, every other existing municipal airport zoning ordinance in Indiana, and the Tall Structures Act designed to operate in localities in Indiana where airport zoning has not been enacted. State-wide paralysis of governmental viability within the vital field of airport zoning presents a situation requiring this Court's review.

IV

The decision below does not rest upon a "'non-federal ground. . . independent of the federal ground and adequate to support the judgment.'" *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281. While respondent contended that the ordinance violated both the state and federal constitutions (*infra*, p. 3a), and the court below quoted the relevant provisions of both in a footnote in its opinion (*infra*, p. 4a, n. 1), at every critical juncture of its analysis the court below invoked and quoted this Court's decisions as the foundation of its reasoning (*supra*, p. 9.), and at no stage did it specify the state constitution as the grounding for its ultimate conclusion that "the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation" (*infra*, p. 10a). The federal source of law underpinning the decision below is especially denoted by its prominent reliance on *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Alleghany County*, 369 U.S. 84 (*infra*, pp. 5a-7a). *Causby* and *Griggs* importantly construed the Civil Aeronautics Act, the Federal Airport Act, and federal regulations. And the inherently federal character of any question of the constitutionality of airport zoning is further apparent from the fact that full account of federal aviation policy is essential to its informed determination.

It was thus by force of this Court's decisions, and the federal constraint exerted by them, that the decision below was reached. Without the influence of necessary obedience to this Court's views, there is no saying that the court below would have arrived at the result it did. For it would be pointless for it to conclude

that the ordinance was valid under the state constitution if it must in any event fall under the federal constitution. Since the premises for the decision below are derived from the compulsion of this Court's opinions, its federal orientation precludes ascribing to that decision an *independent* state basis. Hence, giving maximum weight to the possible existence of a state ground, it was inextricably entwined with the federal ground, and the least that must therefore be said is that the "two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law." *State Tax Commission* v. *Van Cott*, 306 U.S. 511, 514. In that posture, "where the non-Federal ground is so interwoven with the other as not to be an independent matter, . . . our jurisdiction is plain." *Enterprise Irr. District* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164. See also, *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773.

If there were an existing state ground which could be deemed an independent basis of decision, it would not qualify, as it must, under the twin requirement that it be an *adequate* predicate for the judgment. For the consequence of a conclusion that the ordinance had been invalidated upon an independent state constitutional ground would be to bring the decision below into collision with federal aviation policy expressed in the Federal Airport Act and to require its supersession under the Supremacy Clause. "[I]t is 'familiar doctrine' that the federal policy 'may not be set at nought, or its benefits denied,' by the state law." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 32 U.S. Law Week 4206, 4207 (S. Ct. March 9, 1964). The court below faced the

relevance of federal aviation policy when it concluded, albeit erroneously, that the "federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation" (*infra*, p. 9a). Respondent had indeed urged in the court below that its claim of unconstitutionality was compatible with federal aviation policy.[19] There is, therefore, no escape from the federal question. It would be an odd sort of *adequate* state ground, *sufficient* to sustain the judgment, which at once founders on the Supremacy Clause.

The short of it is that the inevitable consequence of the decision below is to restrict the means available to protect aerial approaches to acquisition by purchase or condemnation. That means is financially prohibitive. The "adoption of zoning laws" which Congress has only last month explicitly confirmed as a central element of federal aviation policy is the federally-prescribed alternative to excessive cost. As the Senate Commerce Committee stated, "the committee has no intention of allowing airports to be priced out of existence" S. Rep. No. 446, 88th Cong. 1st Sess., 24. Contrary to the federal scheme the decision below prices airports out of existence in Indiana.

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[19] Respondent's brief in the court below, p. 242. All briefs below have been certified by the clerk of the Indiana Supreme Court and lodged with the clerk of this Court.

These considerations preclude a view that there exists a state ground independent of the federal ground adequate to support the judgment.[20]

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1964

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[20] If ambiguity is nevertheless thought to exist of a gravity which this Court may not wish to resolve without summoning the aid of the court below, the appropriate course would be to grant the writ, vacate the judgment, and remand for clarification. *Minnesota* v. *National Tea Co.*, 309 U.S. 551. For decision by this Court of "important federal issues" should not go by default because of "obscurities and ambiguities" in state court opinions. *Id.* at 557. We do not invite this course, for we believe it to be unnecessary in view of the clear absence of an adequate and independent state ground. We simply present it as an alternative that the Court may desire to consider.

APPENDIX A

ATTORNEYS FOR APPELLANT:

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Of Counsel.

Filed Oct. 24, 1963

IN THE SUPREME COURT OF INDIANA

No. 30109

INDIANA TOLL ROAD COMMISSION, A Body both Corporate and Politic, *Appellant*,

v.

NICK JANKOVICH and PAUL JANKOVICH, Co-partners, d b a Calumet Aviation Company, *Appellees*.

Appeal From the Porter Circuit Court
Alban M. Smith, Special Judge

ACHOR, *Judge*

This is an action for damages alleged to have been sustained by appellees as a result of the construction by appellant of the Indiana East-West Toll Road in violation of a Master Airport Zoning Ordinance of the City of Gary, and the contract rights of appellees as lessees of a portion of the Gary Municipal Airport. The appellees also sought to enjoin and restrain appellant from maintaining the toll road at its present elevation.

The circumstances giving rise to this litigation are as follows: The City of Gary enacted an ordinance in Sep-

tember, 1949, creating an airport commission. The ordinance further purported to incorporate, as a part thereof, the Gary Airport Zoning Map which defined and described details of construction and the boundaries of said airport. The airport so described encompassed an area of approximately one square mile. It was located in an area bounded generally by industrial plants on the north, and on the south by the Grand Calumet River, beyond which were the Lake Shore Railroad, the utility lines of the Northern Indiana Public Service Company, and a residential area.

The ordinance was enacted pursuant to the authority as authorized by Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 109, § 6, p. 252 [being § 14-422, Burns' 1950 Repl.]. The provision therein which is directly related to this litigation, presumed to invest the City of Gary with jurisdiction over structures for six miles in all directions radiating from said airport, and to provide that no structure should be erected within the inner area approach zone to any proposed runway for a distance extending 6,000 feet from the end of the proposed runway to any height which would interfere with the glide angle therefrom of 40 feet horizontally to each one foot of vertical height. The ordinance further provided for the granting of non-conforming uses and variances, upon showing of good and sufficient reasons, before the Board of Zoning Appeals in the City of Gary under its rules and regulations.

Pursuant to said ordinance and in conformity with the details of construction described in said Gary Airport Zoning Map, three runways were constructed, except that approximately 300 feet was omitted from the south end of the north and south runway, which runway is involved in this action.

On or about March 23, 1950, appellees entered into a 20 year lease for the operation of said airport. Pursuant to said lease, appellees expended approximately $400,000 in the building of hangars, the purchase of equipment and

facilities for the operation of the general business of said airport.

Thereafter the appellant located and constructed its toll road, parallel with the south side of the Gary Municipal Airport in such a manner as to cross the inner area approach zone of the north-south runway as prescribed by the ordinance, the road being approximately 743 feet south of the south end of said proposed runway, and approximately 25 feet higher than the elevation of the end of said proposed runway.

Under the ordinance the permitted elevation of structures at the location of the toll road was approximately 18½ feet, the toll road thus projecting itself into the prohibited area about 6½ feet. It is this encroachment by appellants upon the approach zones to the airport, as fixed by the ordinance, that appellees based their action for damages.

Three basic issues are raised by appellants to appellees' right to recover damages by reason of appellant's noncompliance with the ordinance: (1) Does the ordinance rest upon any valid legislative authority; (2) does the ordinance purport to effect a taking of private property for public use in violation of the provisions of Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States; and (3) if the ordinance does not effect an unconstitutional taking of private property for public use, but merely operates as a limitation upon the use of private property by a municipality, within the valid exercise of the police power, may that limitation of use be divested without compensation by an agency of the state which is subsequently granted authority to occupy land and air space upon which there had previously been placed a limitation as to its use?

Because of the decision which we have reached in this case, it is necessary that we consider only appellant's sec-

ond contention, namely, that the provisions of the ordinance relied upon by appellees was unconstitutional in that it purported to appropriate, without compensation, the reasonable and ordinary use of the property on which appellant constructed its toll road.

This reason for the invalidity of the ordinance was urged by appellant in its objection to the admissibility of the ordinance and the maps or plans offered by appellees as a part thereof. The same issue was asserted as grounds for a motion for a finding for the defendant filed at the conclusion of the plaintiffs' evidence and after plaintiffs had rested their case, which motion was overruled.

The fact that private property may not be taken for public use without compensation is not debatable.[1] However, in determining whether this constitutional protection has been violated by the ordinance under consideration, two main issues arise: (1) Whether air space above land is a constitutionally protected property right, and (2) whether in the instant case there has been a constitutionally proscribed taking.

With respect to the first issue, the law has been made clear by both legislative and judicial declaration that a

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[1] "No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Article 1, § 21 Indiana Constitution.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amend. Constitution of the United States.

Pennsylvania Coal Co. v. Mahon (1922), 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158;

General Outdoor Advertising Co. v. City of Indianapolis (1930), 202 Ind. 85, 172 N. E. 309.

landowner is also the owner of the air space above his property, at least to the extent that such air space may reasonably be used by him. The Indiana Legislature has provided that:

> "The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, . . . " Acts 1927, ch. 43, § 3, p. 119 [being § 14-103, Burns' 1956 Repl.].

Also, the property right of a landowner in the air space above his property was recognized in numerous decisions of this court and the federal courts. In *Capitol Airways, Inc.* v. *Indianapolis P. & L. Co.* (1938), 215 Ind. 462, 466, 18 N.E. 2d 776, 778, suit had been brought by an airport operator, who admittedly had no right to take property by eminent domain against a public utility, for damages and an injunction. The wrongful act complained of was the erection of a power line by the public utility which, it was claimed, obstructed the flight of airplanes into and out of the airport. This court affirmed the sustaining of a demurrer to the complaint and stated:

> "The establishment of an airport upon the appellant's land in no way affected or limited the right of adjacent landowners to use their land in any manner and for any purpose for which they might have used it before. Had the appellee chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at appellant's airport. . . . "

The Supreme Court of the United States also has given recognition to property rights in air space accruing to the owner of the land beneath. In *U. S.* v. *Causby* (1946), 328 U. S. 256, 264, 90 L. Ed. 1206, 66 S. Ct. 1062, the problem presented was whether property was taken, within the meaning of the Fifth Amendment to the Constitution of

the United States, by frequent and regular flights of military aircraft over the claimant's land at low altitudes. The court held there had been a taking of an easement over the property for which compensation had to be paid, and stated:

> "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material."

For an excellent analysis of the problem, see *Ackerman* v. *Port of Seattle*; amended opinion at 55 Wash. 2d 400, 348 P. 2d 664 (1960), unamended opinion at 329 P. 2d 210 (1958).

The *Causby* case, *supra*, was reaffirmed by the Supreme Court of the United States on March 5, 1962, in *Griggs* v. *Allegheny County*, 369 U. S. 84, 90, 7 L. ed. 2d 585, 589, 82 S. Ct. 531, reh. den. 369 U. S. 857, 8 L. ed. 2d 16, 82 S. Ct. 931, involving frequent low landings and take-offs over the residence of the petitioner. The Supreme Court held that there had been a taking of property in violation of the Fourteenth Amendment. The reasoning of the court was expressed as follows:

> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. For respondent agreed with the C.A.A. that it would operate the airport 'for the use and benefit of the public,' that it would operate it 'on fair and reasonable terms and without unjust discrimination,' and that it would not allow any carrier to acquire 'any exclusive right' to its use.
>
> "The glide path for the northeast runway is as necessary for the operation of the airport as is a surface

> right of way is [sic] for operation of a bridge, or as is the land necessary for the operation of a dam. See United States v. Virginia Electric & Power Co., 365 US 624, 630, 5 L ed 2d 838, 845, 81 S Ct 784. As stated by the Supreme Court of Washington in Ackerman v. Seattle, 55 Wash 2d 401, 413, 348 P 2d 664, 671, 77 ALR 2d 1344, ' . . . an adequate approach way is as necessary a part of an airport as is the ground on which the airport itself is constructed. . . . ' Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."

In the light of the above authorities we conclude that the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation.

The next problem is whether an unconstitutional taking has resulted in the instant case. In considering this point the distinction must be made between zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of the police power, and a taking of property for a public use, for which compensation must be paid. In the former instance, where the owner of property is merely restricted in the use and enjoyment of his property, he is not entitled to compensation. A common example of such an authorized restriction is the imposition on property of building set-back lines. *Gorieb* v. *Fox* (1927), 274 U.S. 603, 71 L. Ed. 1228, 47 S. Ct. 675; *Bd. of Zoning Ap. of Decatur* v. *Jehovah's Witnesses* (1954), 233 Ind. 83, 117 N.E. 2d 115; *Goldsmith* v. *City of Indianapolis* (1935), 208 Ind. 465, 196 N. E. 525.

However, mere regulation under the police power which can be modified at the discretion of regulating authority is wholly different from the taking or appropriating of private property by the government for a specific public use. The latter can be effected only if compensation is provided. *Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U. S. 393, 67

L. Ed. 322, 43 S. Ct. 158; 1 Metzenbaum, Law of Zoning 70-76 (2d ed. 1955); *Griggs* v. *Allegheny, supra.*

With this distinction established, it becomes apparent that the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary Airport without the payment of compensation.

True, the ordinance provided that an aggrieved landowner might apply for a variance, but there is no provision for compensation in event recourse to such procedure is unsuccessful. In any event, a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is invalid as an entirety. *Village of Euclid* v. *Ambler* (1926), 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114; 1 Metzenbaum, op. cit. *supra* at 708. An unconstitutional law cannot be made constitutional by merely providing a procedure which gives a complaining party the right of judicial review. *Finney* v. *Johnson* (1962), 242 Ind. 465, 179 N.E. 2d 718.

Our attention has been called to the fact that the preamble of the ordinance shows that its purpose is to exercise the right of eminent domain under the guise of the police power.[2] However, as has been stated:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn dufy—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, . . . is

[2] "WHEREAS, it is necessary in the interest of the public health, public safety, and general welfare, that creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power, . . ." Gary Ordinance No. 2897 [dated Sept. 19, 1949].

> a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."
>
> *Mugler* v. *Kansas* (1887), 123 U. S. 623, 661, 41 L. Ed. 205, 8 S. Ct. 273; see also 1 Metzenbaum, *op. cit. supra* at 77-79.

The issue before us was considered by the Supreme Court of New Jersey in the case of *Yara Engineering Corp.* v. *Newark* (1945), 132 N.J.L. 370, 373, 40 A. 2d 559, 561. The City of Newark had adopted an airport zoning ordinance creating airport approaches and turning zones in the vicinity of the Newark Municipal Airport and regulating and restricting the height of structures in these zones. A proceeding was brought to set aside the ordinance. In holding the ordinance unconstitutional, the Supreme Court of New Jersey stated:

> "We conclude that this ordinance . . . is in fact the taking of private property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution, and also the taking for public use without just compensation, in violation of article 1, paragraph 16 of the State Constitution.
>
> "The City may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain. . . . "

See also cases cited at Anno. 77 A.L.R. 2d 1362.

The federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation. This is shown by the condemnation proceedings in *United States* v. *48.10 Acres of Land* (S.D.N.Y. 1956), 144 F. Supp. 258, and *United States* v. *4.43 Acres of Land* (N.D.Tex. 1956), 137 F. Supp. 567, for air easements over property adjoining federal bases.

On the basis of the above authorities, we conclude that the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation.

Appellee finally asserts that even though the ordinance unlawfully may have effected a taking of the land subsequently acquired by the toll road without compensation, it was the duty of "any immediate property owner" to protect himself by inverse condemnation proceedings under authority provided in the Eminent Domain Statute, citing §§ 3-1706 - 3-1711, Burns' 1946 Repl., and that they having failed to do so, their rights must be considered waived.

Appellees' position is not tenable for two reasons: The statute providing for inverse condemnation proceedings presumes (1) that the taking was an accomplished fact, and (2) that it took place under some constitutional authority, with respect to which, however, the prescribed procedure had not been followed. In this case there had not been any actual encroachment upon or taking of the air space over the land in question within the area specified by the ordinance. This was impossible, because the power lines which are adjacent to, parallel with, are much higher than the toll road complained of. Furthermore, as heretofore discussed, the ordinance, upon which appellees' alleged property right is based, was wholly void insofar as it purported to authorize the taking of private property without compensation therefor. Under these circumstances, as conceded by appellees in their brief, "If it [the ordinance] is wholly void then of course no rights are created thereby and it can be the basis for nothing and may be collaterally attacked."

Judgment is reversed and the trial court is directed to sustain appellant's motion for a finding for defendant [appellant], which motion was filed at the conclusion of appellees' evidence.

MYERS, C. J., ARTE BURN & LANDIS, JJ., concur.

JACKSON, J., dissents [without opinion].

APPENDIX B

Ordinance No. 2897

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES, AND OTHERWISE REGULATING THE USE OF PROPERTY IN THE VICINITY OF THE GARY MUNICIPAL AIRPORT BY CREATING AIRPORT APPROACH AND TURNING ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; DEFINING CERTAIN TERMS USED THEREIN; PROVIDING FOR APPEALS THEREFROM; AND IMPOSING PENALTIES FOR VIOLATION THEREOF.

WHEREAS, airport hazards endanger the lives and property of users of the Gary Municipal Airport and the occupants of land in its vicinity, and in effect reduces the size of the area available for the landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and

WHEREAS, the Board of Aviation Commissioners of the City of Gary has, through the power granted it under the Airport Act of 1945 and amendments thereto, adopted certain standards for the safe descend, landing and ascend of aircraft and for the proper and safe use of the Gary Municipal Airport and landing field in respect to height and location of structures and the use of land, and

WHEREAS, it is necessary in the interest of the public health, public safety, and general welfare, that creation or establishment of airport hazards be prevented to the extent legally possible by exercise of the police power, and

WHEREAS, the Board of Aviation Commissioners of the City of Gary has by Resolution recommended the adoption of this ordinance,

NOW, THEREFORE, PURSUANT to the powers granted by virtue of Section 9, Chapter 360, of the Acts of 1945; Chapter 174 of the Acts of 1947; and Chapter 109 of

the Acts of 1949, as well as its general police powers, BE IT ORDAINED by the Common Council of the City of Gary, Lake County, Indiana, as follows:

Section 1: SHORT TITLE—This ordinance shall be known and may be cited as the "Airport Zoning Ordinance of the City of Gary".

Section 2: DEFINITIONS—As used in this Ordinance, unless the context otherwise requires:

(a) "Airport" means the Gary Municipal Airport encompassing the area bounded by the Calumet River on the south, the E. J. & E. Railroad right of way on the west, and by the U. S. Highway No. 12 on the north and east.

(b) "Airport hazard" means any structure or use of land which obstructs the air space required for the flight of aircraft in landing or taking off at the airport or is otherwise hazardous to such landing or taking off of aircraft.

(c) "Non-conforming use" means any structure or use of land which does not conform to a regulation prescribed in this ordinance or any amendment thereto as of the effective date of such regulations.

(d) "Person" means any individual, firm, co-partnership, corporation, company, association, joint stock association or body politic and includes any trustee, receiver, assignee or other similar representative thereof.

(e) "Structure" means any object constructed or installed by man, including but without limitation buildings, towers, smoke stacks, and overhead transmission lines.

(f) "Landing area" means the area of the Airport used for the descend, landing, taking off or taxiing of aircraft.

Section 3. ZONES—In order to carry out the purposes of this ordinance, all the land within the boundaries of the Gary Municipal Airport and within two miles of the end of any proposed runway is hereby divided into:

(a) Turning Zones

(b) Outer Area Approach Zones

(c) Inner Area Approach Zones

(d) Transition Zones

the boundaries of which are shown on the Gary Airport Zoning Map dated April 12, 1949, and which is made a part hereof and incorporated herein by reference, two copies of which Map are on file in the office of the City Clerk and in the Office of the City Engineer, said Map shall be available for examination at all times that said respective Offices shall be open for business. There is hereby incorporated herein by reference and made a part hereof a Lay-Out Plan or Map, dated April 12, 1949, to be used in connection with the Gary Airport Zoning Map, two copies of which said Lay-Out Plan are on file in both the offices of the City Clerk and City Engineer, and which said Maps shall likewise be available for examination.

Section 4: HEIGHT LIMITS—Except as otherwise provided in this ordinance, no structure shall be erected, altered, or maintained, in any airport approach zone or airport turning zone to a height in excess of the height limit herein established for such zone. For purposes of this regulation, the following height limits are hereby established for each of the zones in question:

(a) Turning Zone, 150 feet

(b) Outer Area Approach Zone, 150 feet

(c) Inner Area Approach Zone as indicated (extending 6,000 feet from the end of the proposed runway) not to exceed height greater than permitted of 40 to 1 slope

(d) Transition Zone, height limit based on 7 to 1 slope from edge of inner area approach zone to maximum height of 150 feet

All height limits shall begin at elevation of 590 feet above sea level.

Section 5: Non-Conforming Use—The regulations prescribed in Section 4. of this Ordinance, shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date hereof, or otherwise interfere with the continuance of any non-conforming use. Nothing herein contained shall require any change in the construction, alteration or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted and completed within two years thereof.

Section 6: Variances—Any person desiring to erect any structure or increase the height of any structure or use his property not in accordance with the regulations prescribed in this Ordinance, may apply for a variance therefrom. Such variance shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of this Ordinance. All variances hereunder shall be granted by the Board of Zoning Appeals of the City of Gary as hereinafter constituted and all requests therefor shall be in accordance and under the rules and regulations of the Board of Zoning Appeals of the City of Gary, and all laws now in effect in respect thereto.

Section 7: Appeals—(a) The Board of Zoning Appeals of the City of Gary shall be and is hereby constituted the proper Board to which all appeals from decisions rendered in the enforcement of this ordinance or any other zoning ordinance shall be taken. All such appeals from the decision or ruling of any board, agency or department of the City of Gary in respect to such zoning ordinances shall follow the rules of the said Board of Zoning Appeals, and

all statutes of the State of Indiana in such case made and provided.

(b) Whenever notice of any such appeal shall be served upon any such board, agency or department of the City of Gary, it shall be the duty of the secretary, chairman or department head of any such board, agency or department to immediately notify in writing the Secretary of the Board of Aviation Commissioners of such appeal. The said Board of Aviation Commissioners shall have the power to intervene in such proceedings and be heard insofar as such ruling or decision may affect the operation of said Municipal Airport.

(c) No department, board or agency of the City shall have the power to grant variances hereunder except such Board of Zoning Appeals, and nothing contained herein shall prevent the Board of Aviation Commissioners from appealing such decision or ruling to the Board of Zoning Appeals, or prevent said Board of Aviation Commissioners from appealing any decision, grant or ruling of said Board of Zoning Appeals to a proper court as now provided by law.

(d) Whenever any petition or application shall be filed with the Board of Zoning Appeals for any variance under this ordinance or any other zoning ordinance affecting said Airport, the said Board of Zoning Appeals shall immediately notify the Secretary of the Board of Aviation Commissioners of such application or petition and the said Board of Aviation Commissioners shall be granted an opportunity to be heard in respect thereto.

(e) An appeal from the decision of any such Board, agency or department of the City of Gary to the Board of Zoning Appeals shall stay all proceedings of the action appealed from unless the aggrieved person or the Board of Aviation Commissioners certifies to the Board of Zoning Appeals after notice of appeal has been filed with it, that by reason of the facts stated in the certificate, a stay would

in his or its opinion cause unusual peril to life or property. In such case, proceedings shall not be stayed otherwise than by order of the Board of Zoning Appeals on notice to the Board of Aviation Commissioners on due cause shown.

(f) The Board of Zoning Appeals shall have the same power as is now granted unto it by law in relation to other zoning matters.

Section 8: Whenever and wherever enforcement of this ordinance necessarily involves property or real estate situated within the boundaries of another municipality, the Board of Zoning Appeals is hereby granted authority to act, if in conformance with the ordinances, rules, or regulations of such adjoining municipality, or may act jointly with a Board of Zoning Appeals of any other municipality; if such provisions shall be made by such municipality, it being the intention hereof to permit said Board of Zoning Appeals to cooperate and coordinate in its efforts with any other agency or board of any adjoining municipality towards enforcement in fact and in spirit of the purposes and intent of this ordinance.

Section 9: The construction, erection or maintenance of any airport hazard in violation of this ordinance is hereby declared to be a public nuisance.

Section 10: PENALTIES—Each violation of this Ordinance or any regulation, order, or ruling promulgated hereunder, shall be punishable by a fine of not more than $300.00 and each day a violation continues shall be a separate offense.

Section 11: CONFLICTING REGULATIONS—Where this ordinance imposes a greater or more stringent restriction upon the use of land than is imposed or required by any other ordinance or regulation, the provisions of this Ordinance shall govern.

Section 12: SEVERABILITY—If any of the provisions of the ordinance or the application thereof to any person or

circumstances held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 13: This ordinance shall be in full force and effect from and after its passage.

Passed by the Common Council of the City of Gary, Lake County, Indiana, this 19th day of Sept., 1949.

HOBART D. WIGGERLY
Presiding Officer

ATTEST: NICK P. ELICH
City Clerk

Presented by me to the Mayor for his approval and signature, this 20th day of Sept., 1949.

NICK P. ELICH
City Clerk

Approved and signed by me this 20th day of Sept., 1949.

EUGENE H. SWARTZ
Mayor, City of Gary, Indiana

APPENDIX C

Excerpts from Federal Airport Act, as Amended (60 Stat. 170, 78 Stat. 158, 49 U.S.C. § 1101)

SEC. 2. As used in this Act—

(1) "Administrator" means the Administrator of the Federal Aviation Agency.

(2) "Airport" means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

(3) "Airport development" means (A) any work involved in constructing, improving, or repairing a public airport or portion thereof, including the construction, alteration, and repair of airport passenger or freight terminal buildings and other airport administrative buildings and the removal, lowering, relocation, and marking and lighting of airport hazards, and (B) any acquisition of land or of any interest therein or of any easement through or other interest in air space, which is necessary to permit any such work or to remove or mitigate or prevent or limit the establishment of, airport hazards; but such term does not include the construction, alteration, or repair of airport hangars.

(4) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

(5) "Project" means a project for the accomplishment of airport development with respect to a particular airport.

• • •

(7) "Public agency" means the United States Government or an agency thereof; a State, or Puerto Rico, the Virgin Islands, and Guam, or an agency of any of them; a municipality or other political subdivision; or a tax-supported organization.

(8) "Public airport" means any airport which is used or to be used for public purposes, under the control of a public agency, the landing area of which is publicly owned.

(9) "Sponsor" means any public agency which, either individually or jointly with one or more other public agencies, submits to the Administrator, in accordance with this Act, an application for a grant of funds for airport development.

• • •

NATIONAL AIRPORT PLAN

Formulation of Plan

SEC. 3. (a) The Administrator is hereby authorized and directed to prepare, and thereafter, at least three months prior to the close of each fiscal year, to revise, a national plan for the development of public airports in the United States, including Puerto Rico and the Virgin Islands. Such plan shall specify in terms of general location and type of development, the projects considered by the Administrator to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, which projects shall include all types of airport development eligibile for Federal Aid under this Act and shall not be limited to any classes or categories of public airports. In formulating and revising such plan, the Administrator shall take into account the needs of both air commerce and private flying, the probable technological developments in the science of aeronautics, the probable growth and requirements of civil aeronautics, and such other considerations as he may deem appropriate, and shall to the extent feasible, consult, and give consideration to the views and

recommendations of the Civil Aeronautics Board, the States, Puerto Rico and the Virgin Islands, and their political subdivisions, and shall, to the extent feasible, consult and give consideration to the views and recommendations of, the Federal Communications Commission, and shall make all reasonable efforts to cooperate with that Commission for the purpose of eliminating, preventing, or minimizing airport hazards caused by construction or operation of any radio station. In carrying out this section the Administrator is authorized to make such surveys, studies, examinations, and investigations as he may deem necessary.

* * *

FEDERAL-AID AIRPORT PROGRAM

SEC. 4. (a) In order to bring about, in conformity with the national airport plan prepared and from time to time revised as provided in this Act, the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Administrator is authorized, within the limits of the obligation authority provided in section 5 to make grants of funds to sponsors for airport development and for advance planning and engineering therefor as hereinafter provided.

Announcement of Program

(b) It shall be the duty of the Administrator to make public by January 1 of each year the proposed program of airport development intended to be undertaken during the fiscal year next ensuing, and he may revise such program to the extent he finds necessary to accomplish the purposes of this Act.

* * *

SUBMISSION AND APPROVAL OF ADVANCE PLANNING AND ENGINEERING PROPOSALS AND PROJECTS

Submission

SEC. 9. (a) Subject to the provisions of subsections (b) and (c) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Administrator an advance planning and engineering proposal or a project application in such form, and containing such supporting information, as may be prescribed by the Administrator and setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport plan formulated by the Administrator under this Act, and all such proposed development shall be in accordance with standards established by the Administrator, including standards for site location, airport lay-out, grading, drainage, seeding, paving, lighting, and safety of approaches.

* * *

PROJECT SPONSORSHIP

SEC. 11. As a condition precedent to his approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;

(2) such airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft;

(5) all the facilities of the airport developed with Federal aid and all those usable for the landing and take-off of aircraft will be available to the United States for use by military and naval aircraft in common with other aircraft at all times without charge, except, if the use by military and naval aircraft shall be substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities so used;

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the sponsor as the Administrator may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Administrator after consultation with appropriate public agencies;

(8) the airport operator or owner will submit to the Administrator such annual or special airport financial and operations reports as the Administrator may reasonably request; and

(9) the airport and all airport records will be available for inspection by any duly authorized agent of the Administrator upon reasonable request.

To insure compliance with this section, the Administrator shall prescribe such project sponsorship requirements, con-

sistent with the terms of this Act, as he may deem necessary. Among other steps to insure such compliance the Administrator is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Administrator shall obtain from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and shall construct thereon at Federal expense space or facilities, he is authorized to relieve the sponsor from any contractual obligation entered into under this Act to provide free space in airport buildings to the Federal Government to the extent he finds such space no longer required for the purposes set forth in paragraph (6) of this section.

GRANT AGREEMENTS

SEC. 12. Upon approving an advance planning and engineering proposal or a project application, the Administrator, on behalf of the United States, shall transmit to the sponsor or sponsors of the advance planning and engineering proposal or project application an offer to pay the United States share of the planning and engineering costs or allowable project costs. Any such offer shall be made upon such terms, and subject to such conditions, as the Administrator may deem necessary to meet the requirements of this Act and the regulations prescribed thereunder. Each such offer shall state a definite amount as the maximum obligation of the United States payable from funds authorized by this Act, and shall stipulate the obligations to be assumed by the sponsor or sponsors. If and when any such offer is accepted in writing by the sponsor or sponsors to which it is made, such offer and acceptance shall comprise a grant agreement constituting an obligation of the United States and of the sponsor or sponsors so accepting, and thereafter the amount stated in the accepted offer as the maximum obligation of the United States under such grant agreement shall not be increased by more than 10 per centum. Unless and until such a grant agreement has been executed, the United States shall not pay, nor be obligated to pay, any portion of the costs which have been or may be incurred.

APPENDIX D

Indiana Tall Structures Act (5 Burns Ind. Stat. 14-327 et seq., 1963 Cum. Supp.)

14-327. *Public use airport—Unobstructed conditions for safe flight.*—The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic communication within this state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern area of any public use airport in this state be maintained in a reasonably unobstructed condition for the safe flight of aircraft. To that end, the location and height of structures and the use of land thereto related, is regulated. [Acts 1957, ch. 23, § 1, p. 37.]

14-328. *Definitions.*—As used in this act [§§ 14-327—14-341], unless the context otherwise requires: Commission means the aeronautics commission of Indiana. Structure means any object constructed or installed by man including, but not limited to, buildings, towers, smokestacks, electronic transmission or receiving towers and antennae, and overhead transmission lines;

Permit means a permit issued by the commission under the provisions of this act;

Public use airport means any area of land or water, or both, designed and set aside for the taking off and landing of aircraft and utilized or to be utilized in the interest of the public for such purposes; the term public use airport does not mean nor include a private landing field or personal landing field constructed and used primarily for the benefit of the owner thereof, nor shall it include any military airport or any other airport occupied by any federal or state military branch of government using such airport for military air purposes.

Person means and includes individuals, trustees, receivers, partnerships, associations, corporations for profit and

not for profit, religious corporations, municipal corporations and bodies politic. [Acts 1957, ch. 23, § 2, p. 37.]

14-329. *Permit required to erect, add to the height of or replace structure near public use airport.*—Until a permit therefor has been issued by the commission no person shall erect, add to the height of or replace any structure, unless such replacement only involves the repair, maintenance or restoration of an existing structure:

(a) within an area lying one thousand five hundred [1,500] feet on either side of the extended center line of a runway or landing strip for a distance of two [2] miles from the nearest boundary of any public use airport which will result in a structure extending to a height of more than one hundred fifty [150] feet above the level of such runway or landing strip; nor, within that portion of such area that is within a distance of three thousand [3,000] feet from such nearest boundary, that will result in a structure extending higher than a height above the level of such runway or landing strip determined by the ratio of one [1] foot vertically to every twenty [20] feet horizontally measured from such nearest boundary:

(b) at any other place within this state which will result in a structure extending more than five hundred [500] feet above the highest point of land within a one [1] mile radius from such structure. [Acts 1957, ch. 23, § 3, p. 37.]

14-330 *Excessive height—Restrictions—Issuance of permit.*—No permit shall be issued to erect, add to or replace any structure which will extend more than one thousand [1,000] feet above the highest point of land within a one [1] mile radius from the location of the structure, except as hereinafter provided, nor shall any person erect, add to or replace any structure for which a permit is required that exceeds the height allowed by the permit.

The commission may issue a permit to erect or add to a structure which will extend to a height of more than one

thousand [1,000] feet above the highest point of land within a one [1] mile radius from the location of the structure proposed to be erected or added to if such proposed structure will not be higher than fifty [50] feet above the height of the highest structure in existence on the effective date of this act [§§ 14-327—14-341] which is within a distance of one [1] mile from the location of the structure proposed to be erected or added to.

In any instance where permission of the federal government, or some agency thereof, is required for the erection of an electronic structure the commission shall not issue a permit for the erection thereof until federal permission is granted.

Whenever any person proposes to erect, add to the height of or replace any structure, which would be effected [affected] by the provisions and requirements of section 3(a) [§ 14-329] of this act, obtains consent in writing with verification, to erect, add to the height of or replace any such structure from the owner of the public use airport in the area, then the issuance of any permit under this act shall not be required, provided, however, that such person shall file a copy of such consent with the commission at least thirty [30] days prior to any work, construction, or instalation on the proposed structure. [Acts 1957, ch. 23, § 4, p. 37.]

Compiler's Note. The bracketed word "affected" was inserted by the compiler.

14-331. *Application for permit.*—Application for a permit shall be made to the commission on a form prescribed and furnished by the commission.

It is not necessary that ownership of, option for or other possessory right that to a specific location site be held by the applicant before application for a permit is filed with the commission but any permit granted by the commission shall, among other things, state the location, either specif-

ically or within a definite area, and also the maximum height allowed for a structure. [Acts 1957, ch. 23, § 5, p. 37.]

14-332. *Visual identification characteristics specified in permit.*—Every permit granted shall also specify what, if any, obstruction markers, markings, lighting or other identification shall be installed on or in the vicinity of the structure. Such visual identification characteristics required shall conform to federal laws and regulations where applicable and, if permitted under federal laws and regulations, where lighting is specified the commission may require that the lights, or certain ones thereof, flash at the intervals and in a pattern specified in the permit. [Acts 1957, ch. 23, § 6, p. 37.]

14-333. *Investigation of application for permit—Notice of determination—Hearing, request of applicant for—Appearance of parties.*—Upon receiving an application for a permit the commission shall make such investigation as may be necessary to properly process the application under this act [§§ 14-327—14-341]. Such investigation shall be conducted so as to determine, in the opinion of the commission, a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors.

If, upon such investigation, the commission determines that a permit should not issue or that the height or location should be other than as applied for, the commission shall thereupon notify the applicant in writing of its determination. Such notification may be served by delivering it personally to the applicant or by sending it by first class mail to the applicant at the address specified in the appli-

cation. Such determination shall become final twenty [20] days after notification thereof is served unless the applicant, within such twenty [20] day period, requests in writing that a hearing be held before the commission with reference to the application. All such hearings shall be open to the public. Any person interested may appear and be heard either in person or by counsel and may present such evidence and testimony as may be pertinent. [Acts 1957, ch. 23, § 7, p. 37.]

14-334. *Conduct of hearing.*—Any hearing conducted pursuant to the purposes and provisions of this act [§§ 14-327—14-341] shall be conducted in accordance with Chapter 360, Indiana Acts of 1945, as amended [§§ 14-312—14-325]. [Acts 1957, ch. 23, § 8, p. 37.]

14-335. *Action of commission—Procedure for appeal and judicial review.*—Procedure for appeal and judicial review of any commission action under this act shall be in accordance with existing law and procedure. [Acts 1957, ch. 23, § 9, p. 37.]

14-336. *Order to show cause why application for permit need not be obtained—Date for hearing.*—In any instance where the commission learns or has reasonable grounds to believe that any person is erecting or adding to a structure that would be subject to the provisions of this act [§§ 14-327—14-341] but concerning which no application for a permit has been filed, it may on its own motion issue an order to such person to appear before the commission and show cause why an application for a permit to erect or add to the structure need not be obtained. A date for a hearing thereon shall be set out in such order. [Acts 1957, ch. 23, § 10, p. 37.]

14-337. *Remedies of commission—Enforcement of law, and rules, regulations or orders of commission.*—In addition to any other remedy, the commission may institute in any court of competent jurisdiction an action to prevent, restrain, correct or abate any violation of the provisions

of this act [§§ 14-327—14-341] or of any rules, regulations or orders of the commission issued pursuant thereto. The court may grant such relief, by way of injunction or otherwise, as may be proper under all the facts and circumstances of the case in order to fully effectuate the purposes of this act and the rules, regulations and orders of the commission issued pursuant thereto. [Acts 1957, ch. 23, § 11, p. 37.]

14-338. *Rules and regulations, adoption and promulgation by commission—Administrative forms furnished by commission.*—The commission shall adopt and promulgate, and may from time to time amend or rescind, reasonable rules and regulations for the administration of this act [§§ 14-327—14-341].

The commission shall prescribe and furnish forms necessary for the administration of this act. [Acts 1957, ch. 23, § 12, p. 37.]

14-339. *Exemption of area covered by airport zoning regulations—Change in height or location of prior structure.*—This act [§§ 14-327—14-341] shall not apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law are in effect.

This act shall not be construed to require any change in height or location of any structure in existence on the effective date of this act. [Acts 1957, ch. 23, § 13, p. 37.]

14-340. *Existing buildings or structures—Radio towers—Railroads—Application of law.*—The provisions of this act [§§ 14-327—14-341] shall not apply in respect to the location, relocation, erection, construction, reconstruction, change, alteration, maintenance, removal, use or enlargement of any existing buildings or structures, excepting any radio towers, nor shall the provisions of this act apply to any buildings or structures constructed in the future by

railroads, unless such building or structure lies within an approach zone of an existing airport as such zone is described in section 3(a) hereof [§ 14-329]. [Acts 1957, ch. 23, § 14, p. 37.]

14-341. *Penalty for violation.*—Whoever violates or fails to comply with the provisions of this act [§§ 14-327—14-341] is punishable by a fine of not less than ten dollars [$10.00] nor more than five hundred dollars [$500]. Each day that such violation or failure continues is a separate offense. [Acts 1957, ch. 23, § 15, p. 37.]

APPENDIX E

The Provision of the Indiana Enabling Statute Pertaining to the Adoption of Airport Zoning by a Municipality (5 Burns Ind. Stat. 14-422)

14-422. *Air space—Zoning—Condemnation—Effect—Regulations.*—In order to provide free air space for the safe descent, landing and ascent of aircraft and for the proper and safe use of any airport or landing field acquired or maintained under this act [§§ 14-412—14-433], such board of aviation commissioners is hereby given the right, power and authority, subject to approval and adoption, as provided by law, by the council of such municipality to establish and fix a restricted zone or zones for such distance in any direction from the boundaries of such airport or landing field, within which zone or zones so established, as in the opinion of said board is necessary and practicable, no building or other structure shall be erected high enough to interfere with the descent of an aircraft at such gliding angle as may be deemed necessary for safety for the usual type of operation that is conducted at such airport or landing field and said board may in the name of such municipality, acquire by condemnation, upon the payment of due compensation as hereinafter provided in this act [§§ 14-412—14-433], the right to prevent the erection

of, and to require the removal of, all buildings, towers, poles, wires, cables and other structures, and all trees within such zone or zones which interfere with such gliding angle or so much of any structure or trees as interferes with such gliding angle; and when so condemned no permit issued by any department or office of any such municipality or by any state or other authority for the erection of any structure inside any such zone or zones shall be effective and valid, unless approved by the board of aviation commissioners of such municipality. The establishing of any such restricted zone or zones outside of any such port or field as is herein provided, in connection with the condemnation of such rights in the land for the same, shall be understood to be condemnation and the perpetual annihilation of all rights of the owners of such property within such zone or zones to erect or maintain any building or structure whatever or any part thereof within such zones which will interfere with such gliding angle; or such result may be accomplished by absolute condemnation of the land, with perpetual and irrevocable free license to use and occupy such land within such zone for all purposes except the erection of buildings or other structure above the height so prescribed.

The jurisdiction of each municipality is hereby extended to the promulgation, administering and enforcement of airport zoning regulations to protect the approaches of any airport which is owned by said municipality but located wholly or partially outside the corporate limits of said municipality. In case of conflict with any airport zoning or other regulations promulgated by any municipality, the regulations adopted pursuant to this section shall prevail.

The zoning jurisdiction hereby granted shall, when exercised, be exclusive as against any such jurisdiction granted by any other law of this state now or hereafter adopted unless such other law specifically provides otherwise.

All airport zoning regulations adopted under this act [§§ 14-412—14-433] shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act [§§ 14-412—14-433]. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable. [Acts 1945, ch. 190, § 9, p. 591; 1949, ch. 109, § 6, p. 252.]

Amendments. The 1949 amendment substituted the word "council" for the words "governing authority" following the words "as provided by law, by the" in the first sentence. The amendment inserted the present third paragraph in the section.

APPENDIX F

Excerpts from Grant Agreement Between the City of Gary, Indiana, and the Civil Aeronautics Administration of June 1949

DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON 25

GRANT AGREEMENT

Part I—Offer

Date of Offer June 22, 1949
Gary Municipal Airport
Project No. 9-12-007-701

To: The City of Gary, Indiana
(herein referred to as the "Sponsor")

From: The United States of America (acting through the Administrator of Civil Aeronautics, herein referred to as the "Administrator")

Whereas, the Sponsor has submitted to the Administrator a Project Application dated March 11, 1949 for a grant of Federal funds for a project for development of the Gary Municipal Airport (herein called the "Airport"), together with plans and specifications for such project, which Project Application, as approved by the Administrator, is hereby incorporated herein and made a part hereof; and

Whereas, the Administrator has approved a project for development of the Airport (herein called the "Project") consisting of the following described airport development:

Land acquisition; clear and grub; grade; drain; turf; pave N/S (approx. 100′ x 3100′) and NW/SE (approx. 100′ x 3600′) runways, apron (approx. 150′ x 175′) and connecting taxiway; construct entrance road; furnish and install segmented circle marker and wind indicating device; approach clearance.

all as more particularly described in the survey map and plans and specifications incorporated in the said Project Application;

Now Therefore, pursuant to and for the purposes of carrying out the provisions of the Federal Airport Act (60 Stat. 170; Pub. Law 377, 79th Congress), and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Project Application, and its acceptance of this Offer, as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport, as herein provided,

The Administrator, for and on Behalf of the United States, Hereby Offers and Agrees to pay, as the United States' share of costs incurred in accomplishing the project, 25 percentum of the allowable land acquisition costs and 50 percentum of all other allowable project costs, subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be $166,000.00.

2. The Sponsor shall

   (a) begin accomplishment of the Project within a reasonable time after acceptance of this Offer, and

   (b) carry out and complete the Project in accordance with the terms of this Offer, and the Federal Airport Act and the Regulations promulgated thereunder by the Administrator in effect on the date of this Offer, which Act and Regulations are incorporated herein and made a part hereof, and

   (c) carry out and complete the Project in accordance with the plans and specifications incorporated herein as they may be revised or modified with the approval of the Administrator or his duly authorized representatives.

3. The Sponsor shall operate and maintain the Airport as provided in the Project Application incorporated herein.

4. Any misrepresentation or omission of a materi l fact by the Sponsor concerning the Project or the Sponsor's authority or ability to carry out the obligations assumed by the Sponsor in accepting this Offer shall terminate the obligation of the United States, and it is understood and agreed by the Sponsor in accepting this Offer that if a material fact has been misrepresented or omitted by the Sponsor, the Administrator on behalf of the United States may recover all grant payments made.

5. The Administrator reserves the right to amend or withdraw this Offer at any time prior to its acceptance by the Sponsor.

6. This Offer shall expire and the United States shall not be obligated to pay any of the allowable costs of the Project unless this Offer has been accepted by the Sponsor within 60 days from the above date of Offer or such longer time as may be prescribed by the Administrator in writing.

7. The Administrator, in tendering this offer in behalf of the United States, recognizes the existence of an agency relationship between the City of Gary, Indiana, and the Director of the Aeronautics Commission of Indiana, created by an Agency Agreement, executed by the President of the Board of Aviation Commissioners of Gary, Indiana on February 14, 1949, and by the Chairman of the Aeronautics Commission of Indiana on March 7, 1949, a copy of which is attached hereto and made a part hereof: and the Sponsor agrees that it will not amend, modify, or terminate said Agency Agreement without the prior approval, in writing, of the Administrator or his duly designated representative.

The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and said Offer and acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA
THE ADMINISTRATOR OF CIVIL AERONAUTICS

By GEORGE W. WEST
Regional Administrator, Region III

Part II—Acceptance

The City of Gary, Indiana, does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the Project Application and incorporated materials referred to in the foregoing Offer and does hereby accept said Offer and by such acceptance agrees to all of the terms and conditions thereof.

Executed this 28th day of June, 1949.

CITY OF GARY, INDIANA
(*Name of Sponsor*)

By O. W. BADER
President, Board of Aviation Commissioners, City of Gary.

(SEAL)

ATTEST: C. H. SHAFER
Secretary

CERTIFICATE OF SPONSOR'S ATTORNEY

I, SAMUEL S. DUBIN, acting as Attorney for the City of Gary, Indiana, do hereby certify:

That I have examined the foregoing Grant Agreement and the proceedings taken by said City of Gary, Indiana, relating thereto, and find that the Acceptance thereof by said City of Gary, Indiana, has been duly authorized and that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Indiana, and further that, in my opinion, said Grant Agreement constitutes a legal and binding obligation of the City of Gary, Indiana, in accordance with the terms thereof.

Dated at Gary, Indiana, this 28th day of June, 1949.

SAMUEL S. DUBIN
City Attorney and Attorney for Board of Aviation Commissioners, City of Gary.

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS ADMINISTRATION
WASHINGTON, D. C.

PROJECT APPLICATION

For Federal Aid for Development of Public Airports

PART I

PROJECT INFORMATION

The City of Gary (herein called the "Sponsor") hereby makes application to the Administrator of Civil Aeronautics (herein called the "Administrator") for a grant of Federal funds pursuant to the Federal Airport Act of 1946 and the Regulations issued thereunder, for the purpose of

aiding in financing a project (herein called the "Project") for development of the Gary Municipal Airport (herein called the "Airport") located at latitude 41° 37′ N, longitude 87° 22′ W, in the City of Gary of the State of Indiana.

It is proposed that the Project consist of the following described airport development:

> Gary Municipal Airport, first stage construction consisting of grading, drainage, clearing, paving, in re SE-NW runway and N-S runway approximately 100′ x 3600′ together with parking apron and connecting taxi strip, seeding and sodding adjacent areas, providing access roadway and auto parking space as well as miscellaneous necessary construction.
>
> Also acquisition of a ten acre tract of land within the airport site at a cost as shown under Item 1.

* * *

PART II

REPRESENTATIONS

In order to induce the United States to enter into a Grant Agreement with respect to the Project, the Sponsor hereby represents and certifies as follows:

1. LEGAL AUTHORITY—The Sponsor has the legal power and authority: (1) to do all things necessary in order to undertake and carry out the Project in conformity with the Act and the Regulations: (2) to accept, receive, and disburse grants of funds from the United States in aid of the Project, on the terms and conditions stated in the Act and the Regulations: and (3) to carry out all of the provisions of Parts III and IV of this Project Application.

2. FUNDS—The Sponsor now has on deposit, or is in a position to secure, $168,930.50 for use in defraying the costs of the Project. The present status of these funds is as follows: On deposit at Gary Trust & Savings Bank.

The above amount does not include the estimated U. S. Government share of the land costs, to-wit: $1,350.00.

3. LAND—The Sponsor holds the following property interests in the following tracts of land . . . which are to be developed or used as part of or in connection with the Airport, all of which lands are identified on the survey map which is attached hereto as Exhibit "A": Fee simple.

4. APPROVALS OF OTHER AGENCIES—The Project has been approved by all non-federal agencies whose approval is required, namely: Aeronautics Commission of Indiana.

* * *

7. FUTURE DEVELOPMENT — The Sponsor intends ultimately to develop the Airport as proposed in the current Master Plan Layout for the Airport, which plan has been mutually agreed upon by the Sponsor and the Administrator and intends to proceed with such further development when it is necessary and feasible. The Sponsor further represents that pending such further development and to the extent of its ability to do so, it intends to acquire the lands and interests therein necessary for such development or to take such other action as will protect such proposed lands or interests from any development thereof inconsistent with the intended airport use.

PART III

SPONSOR'S ASSURANCES

In order to furnish the Administrator the Sponsor's assurances required by the Act and the Regulations, the Sponsor hereby covenants and agrees with the United States, as follows:

1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof, made by the Administrator, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and

effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance of an offer of Federal aid for the Project.

2. The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds and classes of aeronautical use without discrimination between such types, kinds and classes; *Provided,* That the Sponsor may establish such fair, equal and non-discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport; *And Provided Further,* That the Sponsor may prohibit any given type, kind or class of aeronautical use of the Airport if such action will best serve the aeronautical needs of the area served by the Airport.

3. The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by Section 303 of the Civil Aeronautics Act of 1938, as amended. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm, or corporation to exercise, any exclusive right for the use of the airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools or the carrying on of any other service or operation requiring the use of aircraft.

4. The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

(a) That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render any service or furnish any parts, materials or supplies (including the sale thereof) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(1) to furnish good, prompt and efficient service* adequate to meet all the demands for its service* at the Airport.

(2) to furnish said service* on a fair, equal and non-discriminatory basis to all users thereof, and

(3) to charge fair, reasonable and non-discriminatory prices for each unit of sale or service*; *Provided*, That the contractor may be allowed to make reasonable and non-discriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

* * *

8. Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods. With respect to land outside the boundaries of the airport; the Sponsor will also remove or cause to be removed any growth, structure, or other object

* Note: As used in these subsections the word "service" shall include furnishing of parts, materials and supplies (including sale thereof) as well as furnishing of service.

thereon which would be a hazard to the landing, taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked or lighted. The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator.

9. All facilities of the Airport developed with Federal aid and all those usable for the landing and taking-off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. The amount of use to be considered "substantial" and the charges to be made therefore shall be determined by the Sponsor and the using agency.

10. The Sponsor will furnish to any civil agency of the United States, without charge (except for light, heat, janitor service, and similar facilities and services at the reasonable cost thereof), such space in airport buildings as may be reasonably adequate for use in connection with any airport air traffic control activities, weather-reporting activities, and communications activities related to airport air traffic control, which are necessary to the safe and efficient operation of the Airport and which such agency may deem it necessary to establish and maintain at the Airport for such purpose.

* * *

13. The Sponsor will maintain a master plan of the Airport having the current approval of the Administrator. Such plan shall show building areas, approach areas, and

landing areas, indicating present and future proposed development. The Sponsor will conform to such master plan in making any future improvements or changes at the Airport which, if made contrary to the master plan, might adversely affect the safety, utility, or efficiency of the Airport.

* * *

PART IV

PROJECT AGREEMENT

If the Project or any portion thereof is approved by the Administrator and an offer of Federal aid for such approved project is accepted by the Sponsor, it is understood and agreed that all airport development included in such project will be accomplished in accordance with the Act and the Regulations, the plans and specifications for such development, as approved by the Administrator, and the Grant Agreement with respect to the project.

IN WITNESS WHEREOF, the Sponsor has caused this Project Application to be duly executed in its name, this 11th day of March, 1949.

CITY OF GARY

By O. W. BADER
President, Board of Aviation Commissioners.